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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1112

WILLIAM LEIGHTON, a stockholder of The One William Street Fund, Inc. for himself and all stockholders of The One William Street Fund, Inc. similarly situated and for and on behalf of The One William Street Fund, Inc.,

Petitioner-Plaintiff,

—v.—

THE ONE WILLIAM STREET FUND, INC., LEHMAN BROTHERS, a partnership, SIMPSON THACHER & BARTLETT, a partnership, and ALLAN B. HUNTER, PAUL E. MANHEIM, PAUL M. MAZUR, FRANCIS C. REED *et al.*,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM LEIGHTON
Petitioner-Plaintiff Pro Se
249 West 11th Street
New York, N. Y. 10014

March, 1969

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IN THE

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No. .....

WILLIAM LEIGHTON, a stockholder of The One William Street Fund, Inc. for himself and all stockholders of The One William Street Fund, Inc. similarly situated and for and on behalf of The One William Street Fund, Inc.,

Petitioner-Plaintiff,

—v.—

THE ONE WILLIAM STREET FUND, INC., LEHMAN BROTHERS, a partnership, SIMPSON THACHER & BARTLETT, a partnership, and ALLAN B. HUNTER, PAUL E. MANHEIM, PAUL M. MAZUR, FRANCIS C. REED *et al.*,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, filed December 6, 1968, reported at 404 F. 2d 351. Such judgment affirmed an order of the District Court for the Southern District of New York, filed April 30, 1968, denying petitioner's motion for a preliminary injunction against the respondents Lehman Brothers and the appoint-

ment of a receiver for the respondent Fund, and for other relief. The order of the District Court has not been reported.

The opinions of the lower courts are appended hereto.

Jurisdiction

(a) The jurisdiction of this Court to review this case by writ of certiorari is invoked pursuant to 28 U. S. C. Section 1254(1).

(b) In aid of this Court's certiorari jurisdiction, the All Writs Act, 28 U. S. C. Section 1651(a) is invoked.

(c) The jurisdiction of the Court of Appeals to review so much of the District Court's order as denied petitioner's motion for a preliminary injunction and the appointment of a receiver was invoked pursuant to 28 U. S. C. Section 1292(a)(1).

(d) The jurisdiction of the Court of Appeals to review so much of the District Court's order as (i) struck petitioner's amended partial complaint and (ii) denied leave to file a supplemental complaint, was invoked pursuant to 28 U. S. C. Section 1291 and the Court of Appeals' construction of that statute in *Phelps* v. *Burnham,* 327 F. 2d 812, *Nichols-Morris Corp.* v. *Morris,* 272 F. 2d 586 and *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119.

(e) The jurisdiction of the District Court over the subject matter of this litigation was invoked pursuant to Section 44 of the Investment Company Act of 1940, 15 U. S. C. Section 80a-43.

Questions Presented

1. Whether the affirmance by the Court of Appeals of so much of the District Court's order of April 30, 1968 as denied petitioner's motion for a preliminary injunction, on the basis of the Court of Appeals' previous judgment in this case, *Leighton* v. *The One William Street Fund Inc.*, 343 F. 2d 565 (2nd Cir., 1965) and as "well within the discretion of the District Court" should not be reversed as consistent error in the interpretation of *S. E. C.* v. *Capital Gains Research Bureau,* 375 U. S. 180 (1963) and of the duties of the District Courts under F. R. Civ. P. 52(a) and 65, where the District Court has failed to make findings of fact and state its conclusions of law as a basis for its decision.

2. Whether, after four-and-one-half-years' litigation, the District Court should not be ordered to hold a hearing on petitioner's motion for a preliminary injunction to enjoin respondents Lehman Brothers from further acting as brokers and investment advisers for the respondent Fund where:

(a) contrary to the requirements of F. R. Civ. P. 65(a)(2), the District Court has refused to hold such a hearing and, by order filed April 30, 1968, has summarily denied petitioner's motion without findings of fact or conclusions of law, and

(b) the Fund has suffered irreparable damage in the amount of $303,941.06 as a proximate result of the District Court's earlier refusal, on August 31, 1964, to enjoin the respondents Lehman Brothers from act-

ing as brokers, investment advisers and principal underwriters for the Fund, and

(c) the District Court's order of April 30, 1968 was entered during a period of time (March 22, 1968 to August 8, 1968) when the respondents Lehman Brothers were found, in a separate proceeding before the Securities and Exchange Commission, to have willfully violated Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-3 thereunder.

3. Whether, after four-and-one-half-years' litigation, the District Court should not be ordered to appoint a receiver for the respondent Fund, with powers to take over the prosecution of this litigation, where the District Court's cumulative errors, abuse of discretion, usurpation of judicial powers, suppression of petitioner's evidence and hostility towards petitioner has resulted in the Fund being irreparably damaged by the respondents Lehman Brothers.

4. Whether the Court of Appeals had jurisdiction under 28 U. S. C. 1291 and its construction thereof in *Nichols Morris Corp.* v. *Morris,* 272 F. 2d 586, 588 (2nd Cir., 1959) to review so much of the District Court's Order of April 30, 1968 as had struck petitioner's amended partial complaint (setting forth the fifth cause of action) where:

(a) the District Court's order is, in terms, a "final decision" which, unless reviewed and reversed now, will result in the Fund being irreparably damaged in the amount of $6,549,374, and

(b) on July 2, 1965, the District Court had granted petitioner leave to re-plead the fifth cause of action of the complaint without limitation as to time, and

(c) on January 4, 1966, the District Court had struck petitioner's interrogatories which sought facts within the knowledge of the respondents Lehman Brothers concerning such fifth cause of action, and

(d) on August 9, 1966, the District Court ordered the respondent Fund to produce for petitioner's inspection the Fund's income tax returns for 1962, 1963, 1964 and 1965 which, when produced, failed to contain particulars of the Fund's securities transactions which the District Court had thought were appended to such returns, and

(e) on May 15, 1968, the District Court refused to hold the respondent Fund, its officers and attorney, in contempt of its August 9, 1966 decision, leaving this record barren of any information concerning the Fund's $6,549,374 loss alleged in the amended partial complaint.

5. Whether the Court of Appeals had jurisdiction under 28 U. S. C. 1291 and its construction thereof in *Nichols Morris Corp.* v. *Morris,* 272 F. 2d 586, 588 (2nd Cir., 1959), to review so much of the District Court's Order of April 30, 1968 denying petitioner leave to file a supplemental complaint where:

(a) petitioner is prevented from filing a new action against the respondents Lehman Brothers and Fund by the District Court's stay and injunction of January 31, 1966 entered in another, pending action against the respondents, and

(b) the District Court's order of August 31, 1964 in this action has given respondents Lehman Brothers

a *carte blanche* to irreparably damage the Fund in the manner set forth in the proposed supplemental complaint.

6. Whether the Court of Appeals has not abused its powers by granting respondents leave to file a bill of costs out of time and of taxing costs against petitioner where the respondents have willfully neglected, for frivolous reasons, to file a bill of costs with the Clerk of the Court of Appeals within the time prescribed by F. R. App. Proc. 39(c) and where petitioner was not given an opportunity to file a response to respondents' motion for such leave, within the time prescribed by F. R. App. Proc. 27(a) for the filing of motions.

7. Whether, by reason of their admitted violations of Section 17(a) of the Securities Exchange Act of 1934 and of Rule 17a-3 thereunder from "about" March 22, 1968 to August 8, 1968, the respondents were not with unclean hands in the District Court and in the Court of Appeals and should not have been denied any and all relief under the theory of *Gaudiosi* v. *Mellon,* 269 F. 2d 783 (3rd Cir., 1959), *cert. denied,* 361 U. S. 902 (1959).

Statutes and Rules Involved

This case involves the construction of the Investment Company Act of 1940, of Rules 52(a) and 65, F. R. Civ. P., of the "final decision" statute, 28 U. S. C. Sec. 1291 and of Rules 27(a) and 39(c), F. R. App. Proc. These and the other statutes and rules involved are set forth in the appendix hereto.

Statement of the Case

(References are to the certified copy of petitioner's appendix below and to the certified transcript.)

> "(Petitioner) suing individually as a stockholder of The One William Street Fund, Inc., and derivatively on behalf of the Fund and its other stockholders, seeks essentially by this action to challenge the validity of the position of Lehman Bros., a partnership, as both investment adviser and broker for the Fund." Opinion of the District Court on respondents' motion for summary judgment (R. 58a).

Petitioner has commenced this suit on August 17, 1964 upon the District Court's suggestion (R. 107a) made in connection with the District Court's opinion and order (R. 101a-108a) denying petitioner's motion to intervene in another stockholder's derivative suit, which has since been discontinued.

On August 31, 1964, the District Court denied (Tr. 119-122) petitioner's first motion for a preliminary injunction, the appointment of a receiver and the disqualification of

counsel, primarily on the ground that any waste of the Fund's assets as a result of mismanagement then alleged in the complaint would be recoverable in damages.

On April 5, 1965, the Court of Appeals affirmed that order primarily on the ground that a plenary trial on the merits is a much better alternative to a hearing on a motion for a preliminary injunction (R. 51a-57a) and holding that all waste would be compensable in damages, *Leighton* v. *The One William Street Fund, Inc.*, 343 F. 2d 565 (2nd Cir., 1965).

On July 2, 1965, the District Court filed an opinion (R. 58a-67a) on respondents' joint motion for summary judgment. The opinion dismissed the first, second and fifth counts of the complaint, with leave to re-plead the fifth, and the first claim of the third count. It left standing the second claim of the third count and the entire fourth count. On July 26, 1965, an order (Tr. 615-618) was entered by the District Court upon that opinion and on July 29, 1965, the District Court denied petitioner's motion for reargument and entry of final judgment on the dismissed counts (Tr. 604). No time limit was set for repleading the fifth count by the July 26, 1965 order.

On September 15, 1965, petitioner commenced discovery proceedings by serving interrogatories directed to respondents Lehman Bros. (Tr. 631-642). The respondents objected to some of the interrogatories and failed to answer the remainder. The objections came on for hearing before the District Court which, on January 4, 1966 filed a memorandum and order (R. 68a), striking all of petitioner's interrogatories and denying petitioner's motion for default judgments against the respondents for failure to answer interrogatories not properly objected to. On July 19, 1966,

the District Court denied an application for a certificate pursuant to 28 U. S. C. Sec. 1292(b). The January 4, 1966 order also denied petitioner's motion for a pre-trial conference for the formulation of issues, F. R. Civ. P. 16.

Meanwhile, on January 31, 1966, the respondents secured from the District Court an *ex parte* order (R. 70a-71a) in another action pending below against the Fund and the respondents since 1965. That order "stayed and enjoined" the stockholders of the Fund from filing or prosecuting any lawsuit embracing any cause of action asserted in such other action. The District Court did not require the respondents to post bond or to give notice of the entry of such "stay and injunction" to the stockholders of the Fund. No findings of fact or conclusions of law were made by the District Court in granting such "stay and injunction." Since the respondents appeared to seek to entrap petitioner into a contempt-of-court proceeding for prosecuting this action despite the "stay and injunction," petitioner moved to vacate or modify such "stay and injunction" to the extent that the court below might hold it applicable to the action at bar. Upon hearing oral argument on this motion on February 15, 1966, the District Court stayed (R. 72a-73a) all further proceedings in this action pending its further order.

On March 9, 1966, the District Court denied by order (R. 74a) petitioner's motion to modify the February 15, 1966 stay on the ground that the relief sought did not come within the purview of the pleadings as they then stood.

On June 13, 1966, the District Court entered an order (R. 75a) on petitioner's motion to vacate or modify its January 31, 1966 order on the basis of the statements

made in the affidavit of respondents' counsel in opposition to such motion. Such statements purported to assure the court below that in securing the "stay and injunction" of January 31, 1966, the respondents had not intended to prevent petitioner from prosecuting the action at bar.

On August 9, 1966, the District Court filed an opinion (R. 77a-80a) denying petitioner's motion for partial summary judgment on the claim with respect to the Transitron losses alleged in the fourth cause of action. The same opinion also directed the respondents to produce for petitioner's inspection the Fund's income tax returns for 1962, 1963, 1964 and 1965. An order (Tr. 1365-1370) was settled on August 19, 1966 upon that opinion and on September 23, 1966, the District Court denied (Tr. 1379), petitioner's application for a certificate pursuant to 28 U. S. C. Section 1292(b).

On September 16, 1966, counsel for the respondents mailed to petitioner copies of the Fund's Federal income tax returns for 1962, 1963, 1964 and 1965 (Tr. 1399). The returns do not contain particulars of any of the securities transactions of the Fund for those years.

On November 18, 1966, the appeals from the District Court's order of January 4, 1966 and August 19, 1966 were dismissed by the Court of Appeals for want of jurisdiction (Tr. 1437).

Between January 31, 1968 and February 5, 1968, petitioner served further interrogatories upon the respondents the answers to which formed the basis of petitioner's proposed supplemental complaint (R. 117a-157a). Petitioner's motion for leave to file this pleading was denied, as a mat-

ter of discretion, by the District Court by order filed April 30, 1968 (R. 158a-163a). Petitioner filed notice of appeal from that order on May 29, 1968 (R. 166a).

On February 14, 1968, petitioner filed and served, pursuant to leave granted by the District Court, an amended partial complaint, R. 82a-116a, re-pleading the fifth cause of action. On respondents' motion, the District Court struck this pleading by the said order of April 30, 1968.

Concurrently with the motion for leave to file a supplemental complaint, petitioner moved to preliminarily enjoin the respondent Lehman Bros. from further acting as broker and investment adviser to the Fund and for the appointment of a receiver for the Fund. This motion was summarily denied by the District Court's order of April 30, 1968.

The respondents' objections to four of petitioner's January 31, 1968 and February 5, 1968 interrogatories (R. 81a) coupled with their motion for a protective order pursuant to F. R. Civ. P. 30(b) were sustained by the District Court on May 15, 1968 (R. 164a-165a) and an order was entered thereon on May 31, 1968 (Tr. 1943-1957). That order also denied petitioner's motion to hold the respondents in contempt of the District Court's production and discovery order of August 19, 1966 and to find that the respondents are with unclean hands in the court below. In aid of this Court's certiorari jurisdiction, petitioner seeks here mandamus or other writ authorized by the All Writs Act with respect to the District Court's order of May 31, 1968.

On December 6, 1968, the Court of Appeals affirmed so much of the District Court's order of April 30, 1968 as had

denied petitioner's motion for a preliminary injunction and the appointment of a receiver and dismissed so much of the appeal as had sought review of the decision to strike petitioner's amended partial complaint and to deny leave to file a supplemental complaint.

On January 9, 1969, the entire record of the proceedings below was certified to this Court by the clerk of the Court of Appeals.

On January 20, 1969, the respondents filed in the Court of Appeals a motion for leave to file a bill of costs out of time. The Court of Appeals granted this motion, on January 23, 1969 without affording petitioner an opportunity to file an opposition to the motion.

On February 5, 1969, in a separate "private administrative proceeding", the Securities and Exchange Commission entered Findings and an Order of Censure, finding that the respondents Lehman Brothers and all of its general partners had willfully violated Section 17(a) of the Securities and Exchange Act of 1934 and Rule 17a-3 thereunder during the period from about March 22, 1968 to August 8, 1968. On February 28, 1969, the respondents served upon petitioner their sworn response to petitioner's request for admitting the entry of the S. E. C. order. These parts of the record are not part of the certified record here. Pursuant to Rule 32 of the Rules of this Court, petitioner will file a motion for an order requiring the Clerk of the District Court to certify these additional portions of the record to this Court. The S. E. C. order and respondents' sworn response admitting its entry are appended hereto.

Reasons for the Allowance of the Writ

I.

This record reveals a gross and shocking miscarriage of justice. This Court's power of supervision is invoked pursuant to Supreme Court Rule 19(1)(b), last sentence.

The history of this litigation reaches over a period of seven years. During all of this time, the lower courts have consistently denied petitioner any relief whatsoever against the respondent Lehman Brothers. In doing so the courts below have adopted towards petitioner an attitude of hostility, bias and prejudice which is reflected in their abuse of discretion and usurpation of judicial powers. Within the limited scope of this petition, petitioner will attempt to point out but a few of the instances revealing not only prejudicial errors affecting petitioner's substantial rights but outright usurpation of judicial powers and abuse of discretion.

Basically, the reason for the attitude referred to is the fact that petitioner is a nonlawyer who is attempting to assert, as against the lawyers and financiers in control of the respondent Fund, the rights conferred upon the Fund's shareholders by the Investment Company Act of 1940. The courts below are firm in their resolve that no relief of any kind should be granted to the shareholders of the Fund despite the waste of the Fund's assets by the respondents Lehman Brothers. If such were not their resolve, the courts below would not have permitted the respondents Lehman Brothers to irreparably damage the Fund over a period of seven years.

On April 30, 1968, the District Court entered its order denying petitioner's motion for a preliminary injunction against the respondents Lehman Brothers and for the appointment of a receiver for the Fund despite the fact that, at that precise time, the respondents Lehman Brothers were (and now concede to have been), in willful violation of Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-3 thereunder. Under Section 203(d) of the Investment Advisers Act of 1940, a finding of such violations required the suspension or revocation of respondent Lehman Brothers' registration as investment adviser. Therefore, quite apart from petitioner's allegations made in the verified proposed supplemental complaint, the central issue which the District Court should have resolved is whether the respondent Lehman Brothers should not have been enjoined from further acting as brokers and investment advisers to the Fund in view of the S. E. C.'s Order of Censure which found that such respondents had willfully violated, from "about" March 22, 1968 to August 8, 1968, Section 17(a) and Rule 17a-3.

Furthermore, the respondents Lehman Brothers became brokers to the Fund on September 1, 1964, after the District Court had denied, by order of August 31, 1964, petitioner's first motion for a preliminary injunction against these respondents, for the appointment of a receiver for the Fund and for the disqualification of respondents Simpson Thacher & Bartlett as counsel in control of this litigation. Therefore, the District Court should also have determined the question left open by the S. E. C.'s Order of Censure, namely, whether between September 1, 1964 and March 22, 1968, the respondents Lehman have been

in compliance with the record-keeping requirements of Section 17(a) and Rule 17a-3.

Petitioner does not impute to the District Court knowledge of respondent Lehman Brothers' violations of that statute since these respondents then concealed such violations from the District Court and from petitioner. But the District Court could have determined the existence of such violations had it performed its statutory duty of holding the evidentiary hearing required by F. R. Civ. P. 65(a)(2) and of making the findings of fact and conclusions of law required by F. R. Civ. P. 52(a). This is so because when the District Court heard argument, on April 9, 1968, on petitioner's motion, there was pending before another judge of the District Court petitioner's motion to hold respondents in contempt of the District Court's production and discovery order of August 19, 1966. That order required the respondents to produce for petitioner's inspection the Fund's income tax returns for 1962, 1963, 1964 and 1965. When produced to petitioner by the Fund's counsel, the Fund's Federal income tax returns failed to show the particulars of the Fund's securities transactions, contrary to the purpose of the discovery and production order. As it now appears, the respondents' failure to include such particulars in the 1962, 1963, 1964 and 1965 Federal income tax returns is due to their failure to keep their records in order during those years.

Therefore, a proper review by this Court of the circumstances under which the District Court entered its order of April 30, 1968 also requires review of the District Court's refusal to enforce its 1966 production and discovery order through its contempt power and its refusal to rule

on the validity and sufficiency of the Fund's Federal income tax returns for 1962, 1963, 1964 and 1965. Such refusal appears from the District Court's decision of May 15, 1968 (R. 164a-165a), upon which an order was entered on May 31, 1968. Since that order did not appear to be appealable, petitioner argued to the Court of Appeals that the order be reviewed by it pursuant to its practice of treating appeals as petitions for mandamus where an order is determined not to be appealable, *International Products Corp.* v. *Koons,* 325 F. 2d 403, 407 (1963); *United States* v. *Jean Nebbia,* 357 F. 2d 303 (1966). The Court of Appeals ignored petitioner's argument.

The most unjust aspect of the District Court's order of May 31, 1968 is its entry during a period of time that the respondents Lehman Brothers were (and now have conceded to have been), in violation of Section 17(a) and Rule 17a-3. Petitioner contends that the order constitutes an abuse of discretion and a usurpation of judicial power which calls for review by this Court pursuant to the All Writs Act, 28 U. S. C. Section 1651(a), in aid of this Court's certiorari jurisdiction to review the District Court's order of April 30, 1968.

II.

The Court of Appeals' refusal to follow *S. E. C.* v. *Capital Gains Research Bureau*, 375 U. S. 180 is consistent error and should be reversed.

In 1965, petitioner prosecuted an appeal from the District Court's denial, by order filed August 31, 1964, of petitioner's first motion for a preliminary injunction against the respondents Lehman Bros. The Court of Appeals' affirmance of that order, 343 F. 2d 565, was based, in part, on the theory that *S. E. C.* v. *Capital Gains Research Bureau*, 375 U. S. 180,

> "presented a completely distinguishable situation. * * * It had nothing to do with a brokerage firm and it did not go so far as to order a severing of the advisory relationship." 343 F. 2d at 568.

The Court of Appeals then and there laid down a principle of discrimination in favor of respondents Lehman Bros., for *Capital Gains* presented a situation where an investment adviser had realized $19,674 in profits from trading upon his recommendations to his clients, but had not actually damaged them, whereas the 1965 appeal presented the question whether respondent Lehman Bros. should not be enjoined because of the actual $213,398.56 damage inflicted upon the Fund by these respondents as a result of the Transitron transactions described in the complaint, which transactions such respondent had concealed from the stockholders of the Fund along with the transactions of Lehman partners in the portfolio securities of the Fund.

The paradox of the case at bar is that the Court of Appeals, continuing its error in distinguishing *Capital*

Gains and expressly relying on its 1965 judgment, did not deem the Fund's loss of $303,941.06 from the 1966 T. W. A. transactions to be important enough so as to warrant findings of fact and conclusions of law by the District Court. The $303,941.06 loss occurred under these circumstances:

Following the entry of a default judgment against Hughes Tool Company ("Toolco"), see *TWA* v. *Hughes,* 332 F. 2d 602, Toolco decided to sell its interest in TWA. On May 3, 1966 an underwriting syndicate headed by Merrill Lynch, Pierce, Fenner & Smith, Inc. made a secondary offering of 6,584,937 shares of TWA at $83 per share and re-offered the same to the public at $86 per share. Respondent Lehman Bros. participated in the underwriting syndicate, its commitment being 115,000 shares.

Since the Fund's reports to the stockholders revealed portfolio purchases and sales of TWA common stock immediately after, but never before, May 3, 1966, petitioner propounded certain interrogatories to respondent Lehman Bros. with respect to the TWA transactions (Tr. 1446-1452). With the exception of one, the interrogatories were answered (Tr. 1538-1558), and therefrom it appears that respondent Lehman Bros.

(a) advised the Fund to purchase 35,000 TWA shares of common stock on the open market after the effective date of the TWA prospectus of May 3, 1966, but before July 1, 1966, at about $96.916 per share;

(b) advised the Fund to purchase a further block of 10,000 TWA shares of common stock by September 30, 1966;

(c) advised the Fund to sell its entire portfolio position (45,000 shares) in TWA common stock in 1967, at a loss of $303,941.06 to the Fund.

In short, the Fund's TWA portfolio transactions appeared as another variant of the Transitron transactions described in the complaint, i.e. the use of the Fund's assets in furtherance of respondent Lehman Bros.' and its clients' trading in TWA common stock, whether for stabilizing or other purposes. Despite the fact that the Transitron transactions and the resulting $213,398.56 loss had been recognized by the Court of Appeals as a "waste" and the cause of action based thereon had survived respondents' motion for summary judgment, the District Court, by order of May 31, 1968, sustained respondent Lehman Brothers' objection to petitioner's interrogatory concerning Lehman's disposition of its TWA underwriting commitment of 115,000 shares, apparently on the theory that the $303,941.06 loss from the TWA transactions did not constitute "waste".

Petitioner had and has good cause for believing that Lehman's customers, as "tippees", had bought the TWA shares at $86 from the May 3, 1966 "secondary" and have unloaded that stock for a quick profit upon being "tipped" that Lehman had advised the Fund to purchase TWA common @ $96.916 per share prior to July 1, 1966. Petitioner's belief is based upon Lehman's admission (Tr. 1556) that the Fund did not purchase the 35,000 TWA shares @ $86 per share from the May 3, 1966 "secondary".

Respondent Lehman's reasons for not directly selling to the Fund a portion of its allotment is understandable. Such a sale would have required an exemptive order under Section 17(b) of the Investment Company Act of 1940. Lehman's opposition to petitioner's interrogatory is also understandable. If Lehman's customers had resold to the Fund the TWA shares which these customers had bought

from Lehman, such transactions, too, would have required exemptive orders under Section 17(b) of the 1940 Act since Lehman's customers are persons affiliated with Lehman within the meaning of Section 2(a)(3)(C) of the 1940 Act. No such orders were alleged to have been entered by the S. E. C.

Since the Fund had bought TWA common stock on Lehman's advice and Lehman's customers had traded in TWA common on Lehman's advice, there appears to be here a clear case of insider trading which is reached by the law expounded by the Court of Appeals in *S. E. C.* v. *Texas Gulf Sulphur,* 401 F. 2d 833 (2nd Cir., 1968), by Section 17(a) of the Investment Company Act of 1940, and by *S. E. C.* v. *Capital Gains, supra.*

Therefore, petitioner moved the District Court to allow the filing of a supplemental complaint setting forth a claim with respect to the 1966 T. W. A. transactions, among other claims. Petitioner pursued this course and did not file a separate action because the respondents had obtained, in another pending action in the District Court, a "stay and injunction" enjoining all of the stockholders of the Fund from prosecuting or instituting any new actions based on certain unspecified causes of action. In a proceeding to determine the scope of the injunction and its applicability to the instant litigation, the District Court entered an Order on June 13, 1966 (R. 75a-76a) limiting petitioner's right to proceed against the respondents to the prosecution of the instant litigation.

The December 6, 1968 judgment of the Court of Appeals in effect nullifies its 1965 judgment, for the Court of Appeals had then said:

> "If Lehman Brothers should act improperly as broker for the Fund, monetary damages would be an entirely adequate form of relief", 343 F. 2d at 568.

Despite the fact that petitioner had made a showing of a further $303,941.06 loss the Court of Appeals still denied petitioner the least relief to which petitioner is entitled under the circumstances of this case, i.e. reversal of the District Court's order of April 30, 1968, denying petitioner leave to file a supplemental complaint.

III.

The Court of Appeals' conflicting views as to the scope of its jurisdiction under 28 U. S. C. Sec. 1291 and 28 U. S. C. Sec. 1651(a) should be reviewed by this Court.

For asserted want of jurisdiction, the Court of Appeals dismissed so much of the District Court's Order of April 30, 1968 as had (i) struck petitioner's amended partial complaint and (ii) denied leave to file a supplemental complaint. Petitioner did brief and argue the jurisdictional issue to the Court of Appeals, but its opinion and judgment of December 6, 1968 is silent on that point.

The Court of Appeals' perplexing views as to what constitutes a "final decision" that is reviewable pursuant to 28 U. S. C. Section 1291 are to be found in such cases as *Phelps* v. *Burnham,* 327 F. 2d 812 and *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119, *cert. denied,* 386 U. S. 1035, 391 F. 2d 535 (1968).

Specifically relying on the Court of Appeals' opinion in *Nichols Morris Corporation* v. *Morris,* 272 F. 2d 586, 588 (1959), petitioner invoked the Court of Appeals' juris-

diction pursuant to 28 U. S. C. 1291 to review the District Court's final decision to strike the amended partial complaint and deny leave to file the proposed supplemental complaint. The Court of Appeals did not explain in its opinion why, in its view, *Nichols Morris* is distinguishable.

Equally perplexing is the Court of Appeals' practice of treating certain appeals from nonappealable orders as petitions for mandamus under 28 U. S. C. Section 1651(a), as it had done in *International Products Corporation* v. *Koons,* 325 F. 2d 403, 407 (1963) where it reviewed, under its mandamus powers, a protective order entered below pursuant to F. R. Civ. P. 30(b), and in *United States* v. *Jean Nebbia,* 357 F. 2d 303 (1966), where it reviewed, in a criminal case, an order admitting a defendant to bail.

Petitioner briefed and argued below the question whether the Court of Appeals should not vacate, by writ of mandamus, the District Court's "stay and injunction" of January 31, 1966 (R. 70a-71a) that limits petitioner's freedom to commence another action against the respondents, the limitation having been imposed by the District Court's order of June 13, 1966 entered in this action (R. 75a-76a). The "stay and injunction" was issued on January 31, 1966 without respondents giving bond, without notice to petitioner or the other shareholders of the Fund and without observance of any of the procedural requirements of F. R. Civ. P. 65. It is a prime example of usurpation of judicial powers that should be struck by mandamus.

The Court of Appeals remained silent as to its reasons for reviewing, by mandamus, the order in *International Stretch,* but for refusing to review, by the same method, the January 31, 1966 "stay and injunction" and the June 13, 1966 order.

IV.

A preliminary injunction and the appointment of a receiver is the minimum relief necessary to stop the further waste of the Fund's assets and to bring this litigation to a speedy conclusion.

This case has been pending in the lower courts for four-and-one-half years. At the commencement of this action the District Court has shown its hostility towards petitioner by imposing upon petitioner, on September 4, 1964, the requirement of posting $1,000 as "security for costs". This order was affirmed by the Court of Appeals' 1965 judgment, 343 F. 2d 565. The lower courts did not impose upon respondent Lehman Brothers the requirement of showing evidence of financial responsibility as a condition for permitting these respondents to become brokers to the Fund effective September 1, 1964, or for continuing as investment advisers to the Fund. The lower courts have refused to believe that respondent Lehman Brothers would, in due time, be in willful violation of Section 17(a) of the Securities Exchange Act of 1934, of Rule 17a-3 thereunder.

Despite the showing made by petitioner that respondent Lehman Brothers had concealed from the Fund's shareholders the Transitron transactions and loss of $213,398.56 and the trading by Lehman partners in the portfolio securities of the Fund, the lower courts distinguished *Capital Gains,* meaning, in effect that a small investment adviser like *Capital Gains* is subject to a preliminary injunction but a large one, like the respondent Lehman Brothers, is not. This error has carried into the Court of Appeals' judgment of December 6, 1968, here sought to be reviewed.

Thereafter, the lower courts refused to enjoin the Fund from delivering a release in settlement of the $213,398.56 Transitron loss, without finding the facts or stating their conclusions of law. Subsequently, petitioner moved for partial summary judgment with respect to respondent Lehman Brothers' liability on account of the Transitron transactions and after extensive discovery has been had by way of interrogatories. Again, the District Court refused to enter the order required by F. R. Civ. P. 56(d), which is the sole procedure whereby the remaining triable issues of material fact are determinable.

Throughout this litigation, the lower courts have refused to enjoin the respondents Lehman Brothers from making use of false and misleading proxy statements that are designed to continue such respondents' control over the Fund. For example, the 1966 T. W. A. transactions, which have resulted in a $303,941.06 loss to the Fund, were made on the advice of respondent Lehman Brothers whose contract as investment adviser to the Fund was ratified by the shareholders at the annual meeting of March 15, 1966. By order filed herein (R. 74a) on March 9, 1966, the District Court refused to enjoin the proxy solicitation for that meeting. Ignoring *Capital Gains,* the District Court did not then impose upon respondent Lehman Brothers the requirement of disclosing to the shareholders of the Fund portfolio transactions in securities underwritten by such respondent. The needless Transitron and T. W. A. losses have resulted from such transactions but the shareholders of the Fund have not had disclosure thereof.

Refusing to enforce its 1966 production and discovery order, the District Court has now cut off inquiry into the Fund's false and fraudulent 1962, 1963, 1964 and 1965 Fed-

eral income tax returns. The respondent Lehman Brothers, who are managing agents of the Fund under the terms of the investment advisory contract, have, contrary to 26 U. S. C. 852(c) improperly reduced the Fund's taxable and distributable income by the amount of the securities losses attributable to their underwriting transactions and amounting to about $6,549,374. The respondent Lehman Brothers have concealed these losses from the Internal Revenue Service, for fear that they may be disallowed, from the shareholders of the Fund, who are entitled to notice thereof under the theory of *Capital Gains,* and from the District Court, which on October 2, 1962 dismissed a then pending stockholder's derivative suit without requiring these defendants to make discovery of their liabilities up to that time. Now, the District Court has struck, by its order of April 30, 1968, petitioner's amended partial complaint which attempts to assert the Fund's derivative claims against the respondent Lehman Brothers in the amount of $6,549,374.

Under the totality of these circumstances, a preliminary injunction, based on findings and conclusions as to the mismanagement and waste of the Fund's assets since the inception of this litigation, would appear to be the proper remedy. The purpose of F. R. Civ. P. 65(a)(2) is to provide a procedure for consolidating such a hearing with a trial on the merits.

Furthermore, the appointment of a receiver to take over this litigation should be ordered. The cases are legion where receivers have been appointed by the Federal courts *after* hearing applications for preliminary injunctions, e.g., *S. E. C.* v. *Fifth Avenue Coach Lines,* 289 F. Supp. 3 (S. D. N. Y., 1968). The question here is whether the

District Court should appoint a receiver to represent the Fund at such a hearing and at any subsequent trial.

This case involves the delicate question of the settlement of the Transitron litigation by counsel specially retained by the Fund for such purpose. The record shows that the Hon. Milton Pollock was such counsel. Petitioner should not be required to assume the delicate task of litigating before the District Court Judge Pollock's handling of the Transitron litigation and of his interest therein, see *Cherner* v. *Transitron Electronics Corporation,* 221 F. Supp. 48, 55 (D. Mass., 1963). The District Court has avoided this delicate matter by refusing to enter an order pursuant to F. R. Civ. P. 56(d) in connection with petitioner's motion for partial summary judgment with respect to the Transitron transactions (Opinion of August 9, 1966, R. 77a-80a).

V.

The Court of Appeals has abused its discretion and has exceeded its powers in granting the respondents leave to file a bill of costs out of time.

Judgment was entered by the Court of Appeals on December 6, 1968. Within 14 days thereafter the respondents could have filed their bill of costs with the Clerk of the Court of Appeals, Rule 39(c), F. R. App. Proc. The respondents neglected to do so within that period of time.

On January 7, 1969, the Court of Appeals denied petitioner's motion to stay the mandate and on January 9, 1969, the Clerk of the Court of Appeals certified the proceedings below to this Court. At that point the Court of Appeals lost jurisdiction of this cause.

The respondents then realized that they had neglected to file a timely bill of costs and, on January 20, 1969, filed a motion "for leave to file an itemized and verified bill of costs". The Court of Appeals granted this motion on January 23, 1969 without giving petitioner an opportunity to file a response to respondents' motion, as required by Rule 27(a), F. R. App. Proc.

Petitioner contends that the Court of Appeals has exceeded its powers by granting respondents' motion without receiving and considering petitioner's response, since the motion was one for substantive, not procedural, relief. Petitioner also contends that the Court of Appeals was without jurisdiction to grant the respondents any relief on January 23, 1969 since it was not then possessed of the record.

Through their own fault and negligence, the respondents have failed to comply with the time limits prescribed by Rule 39(c) and should have forfeited their right to have costs taxed against petitioner. The respondents gave as their reason for their neglect their failure to receive from their printer an itemized bill for a brief which had been filed below in November, 1968. Respondents' difficulties with their printer is not the concern of Rule 39(c). Rather, the respondents demonstrated their lack of familiarity with the Rule which hardly justifies a departure from the time limits prescribed by Rule 39(c).

VI.

The respondents have come into equity with unclean hands. The lower courts should have denied them any equitable relief.

> "One who comes into equity must come with clean hands and keep those hands clean throughout the pendency of the litigation even to the time of ultimate disposition by an appellate court. Courts are concerned primarily with their own integrity in the application of the clean hands maxim and even though not raised by the parties, the court will on its own motion apply it. The clean hands maxim gives wide sweep to the equity court's exercise of discretion 'in refusing to aid the unclean litigant' ". *Gaudiosi* v. *Mellon,* 269 F. 2d 783, 881 (3d Cir., 1959) *cert. denied,* 361 U. S. 902 (1959).

With the consent of the respondent Lehman Bros., the S. E. C. has found that this respondent was in willful violation of Section 17(a) of the Securities Exchange Act of 1934 and of Rule 17a-3 thereunder. In the case of ordinary broker-dealers, when such findings are made, the S. E. C. will file a civil suit against such broker-dealer seeking an injunction against future violations. Hundreds of such cases have been reported by the S. E. C. to the Congress in its annual reports. Use of this procedure enables the S. E. C. to seek civil contempt orders from the courts in the event of further violations by the ordinary broker-dealer. But in the contemplation of the S. E. C., respondent Lehman Bros. is not an ordinary broker-dealer. That seems to be the reason why the S. E. C. has initiated "private" administrative proceedings against respondent Lehman Bros., perhaps out of

fear that the public may seek to intervene had the proceedings been public and had notice thereof been given as required by law.

Since the S. E. C. has conducted its proceedings in "private", the respondent Lehman Bros. has been able to conceal its admitted violations from petitioner and from the courts below. Petitioner contends that this is prima facie evidence that this respondent was with "unclean hands" in the courts below. The legal consequences of the respondent's admitted violations and of their concealment from the courts are far and wide. Under *Gaudiosi,* the District Court should vacate its orders of April 30, 1968 and May 31, 1968 (the latter entered upon its opinion of May 15, 1968, R. 164a-165a). But, unless this Court grants certiorari and orders that the District Court apply the unclean hands doctrine, the District Court will not do so and the record proves it.

The bitter irony of this case is that the May 31, 1968 order of the District Court also denied petitioner's motion to find that the respondents had been in equity with unclean hands by reason of their concealment of their trading in the portfolio securities of the Fund since August 31, 1964. That was the date of the hearing on petitioner's first motion for a preliminary injunction against the respondent Lehman Bros. and the date the District Court entered its order denying it.

August 31, 1964, April 30, 1968 and May 31, 1968 and the periods in between were not the only times that these respondents had come into equity with unclean hands. The respondents had concealed from the District Court and from petitioner their liability with respect to insider trading in the portfolio securities of the Fund in connection with the settlement of another stockholder's derivative suit,

which the District Court had dismissed on October 2, 1962. That is the suit in which petitioner had attempted to intervene (R. 101a-108a). Less than one year after that dismissal, the S. E. C. "Special Study" published its findings concerning such insider trading that covers the period prior to the entry of the order of dismissal of October 2, 1962. Petitioner alleged the "Special Study" findings in the complaint in the case at bar. Despite this, the District Court denied preliminary injunctive relief on August 31, 1964 and the Court of Appeals affirmed on April 5, 1965.

Despite the findings of its "Special Study", the S. E. C. has failed to take any action against the respondent Lehman as the law required it to do, Section 36 of the Investment Company Act of 1940, 15 U. S. C. Section 80a-35. This is in contrast with the S. E. C.'s action in *Capital Gains, supra* and *Texas Gulf, supra.* Since the statute of limitation for S. E. C. action under Section 36 has expired, the burden of litigating these liabilities has fallen upon petitioner because this action was commenced before the expiration of such statute of limitations and specifically seeks relief with respect to liabilities based upon the Special Study's findings.

Petitioner believes that he has made herein a showing of the odds against him in the lower courts. After battling such odds over a period of seven years, petitioner prays that this Court should exercise its powers of supervision and direct the District Court to appoint a receiver for the Fund, with powers to take over the prosecution of this litigation upon petitioner's request.

Respectfully submitted,

WILLIAM LEIGHTON
Petitioner-Plaintiff Pro Se

APPENDICES

APPENDIX I

Opinion and Judgment Filed December 6, 1968

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 189—September Term, 1968.

(Argued December 3, 1968 Decided December 6, 1968.)

Docket No. 32508

• • • • •

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and RYAN, *District Judge.**

Appeal by plaintiff from an order of the District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* in a stockholder's derivative action. Order affirmed in part, appeal dismissed in part.

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PER CURIAM:

The plaintiff in this stockholder's derivative action in the District Court for the Southern District of New York appeals from an order of Judge Tyler disposing of various motions. In one portion of the order the judge denied plaintiff's application—in fact his third, see 343 F. 2d 565 (2 Cir. 1965) for the first—for a preliminary injunction and the appointment of a receiver. We affirm this as well

* Of the Southern District of New York, sitting by designation.

within the discretion of the district court. In other portions of the order the judge struck an "Amended Partial Complaint" as not complying "with either the letter or the spirit" of the leave given nearly three years before, and denied leave to serve and file a proposed supplemental complaint. Since portions of plaintiff's complaint remain pending and undetermined, we dismiss the appeal from this part of the order for want of appellate jurisdiction.

Opinion and Judgment Filed April 5, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 335—September Term, 1964.

(Argued March 8, 1965 Decided April 5, 1965.)

Docket No. 29227

* * * * *

Before:

SMITH and MARSHALL, *Circuit Judges,* and METZNER, *District Judge.**

Appeal from three orders of the United States District Court for the Southern District of New York, Wilfred Feinberg, Harold R. Tyler, Jr. and Irving Ben Cooper, *JJ.*, requiring William Leighton to post $1,000 bond in his stockholders derivative suit against certain directors of the One William Street Fund, Inc. and others, and denying Leighton's motions for injunctive relief and for the appointment of a receiver.

Affirmed.

* * * * *

SMITH, *Circuit Judge*:

William Leighton, a stockholder of record of the One William Street Fund, Inc. (the "Fund"), appeals from three

* Sitting by designation.

separate orders of the United States District Court for the Southern District of New York, Wilfred Feinberg, Harold R. Tyler, Jr. and Irving Ben Cooper, *District Judges,* respectively, requiring plaintiff to post $1,000 as security for costs in his derivative suit and denying plaintiff's motions for: (1) a preliminary injunction restraining Lehman Brothers from acting as broker for the Fund; (2) the appointment of a receiver for the Fund; (3) an injunction against the voting of proxies solicited by means of a certain July 31, 1964 proxy statement; and (4) an injunction to prevent the Fund from delivering an instrument in the nature of a release in settlement of the Fund's suit against the Transitron Electronic Corporation. Leighton, the owner of ten shares of the Fund out of a total of 17,000,000, instituted this derivative stockholders suit against the Fund, Lehman Brothers (the Fund's investment adviser), and four individual directors of the Fund, three of whom are partners in Lehman Brothers.

Leighton contends on appeal that requiring him to post security for costs constitutes an abuse of discretion and that the denials of the injunctions and of the motion for the appointment of a receiver are similarly improper, in particular because the court in each instance did not specify the grounds upon which the motion was being denied. We find that the $1,000 bond is reasonable under the circumstances, that the failure to make findings of fact and conclusions of law in ruling on the motions was harmless error, and that Leighton as a matter of law was not entitled to any of the relief requested by him. Judge Tyler's order denying the injunction to prevent the voting of the proxies is now moot; the remaining orders are affirmed.

I.

The granting of appellees' motion for security was proper under Rule 2, Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York.[1] We recently held in *Leighton* v. *Paramount Pictures Corp.*, Docket No. 28831 (Jan. 12, 1965), that Rule 2 empowers the District Court to compel security for costs in a derivative suit where such security is appropriate. Where, as here, the risk of abuse is manifest (Leighton purchased his ten shares only one month before he commenced his efforts to take part in shareholder litigation), requiring that bond, reasonable in amount, be posted as a condition to the continued prosecution of the derivative action, is justified. There is no claim here of inability to post the $1,000 bond set, and it has in fact been posted. We hold the amount reasonable.

II.

Judge Tyler, in apparent non-compliance with Rule 52(a) of the Federal Rules of Civil Procedure which requires the court to find the facts specially and state separately its conclusions of law, rejected plaintiff's motion rather summarily by simply saying, "for the reasons stated in open court and upon the record, said motion is in all respects

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[1] Rule 2—Security for Costs

The court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

denied." Judge Cooper elaborated somewhat more on the grounds for denying the motion before him, but his concise opinion hardly satisfied the requirements of the Rule. The purpose of Rule 52(a), as it is applied to a non-jury case, is usually stated to be three-fold: (1) to aid the appellate court by affording it a clear understanding of the ground or the basis of the decision of the trial court; (2) to make definite just what is decided by the case to enable the application of *res judicata* and estoppel principles to subsequent decisions; and (3) to evoke care on the part of the trial judge in ascertaining the facts. Barron and Holtzoff, Federal Practice and Procedure, §1121 (1961), 5 Moore, Federal Practice, ¶52.06[2] (2d ed. 1951). Of course, the general intent of Rule 52(a) is that of avoiding possible prejudice to any of the parties in the prosecution or defense of the controversy. Thus, where the court's failure to make the required findings does not have the effect of prejudicing a party's position the error may be merely harmless. See 28 U. S. C. §2111, the "harmless error" statute; *Rossiter* v. *Vogel*, 148 F. 2d 292 (2 Cir. 1945); *Jockmus* v. *United States*, 335 F. 2d 23 (2 Cir. 1964). Under analogous circumstances, in a case involving Rule 51, this court held that failure to comply with that Rule does not automatically require reversal unless it is reasonable to suppose that there has been resulting prejudice to one of the parties. *Swain* v. *Boeing Airplane Co.*, 337 F. 2d 940 (2 Cir. 1964), cert. denied —— U. S. ——, March 29, 1965. Where, as in this case, it is possible to determine the bases upon which the court below acted, and the record is clear enough for appellant to recognize those grounds, appellant has not been prejudiced.

Leighton's rights in the prosecution of his derivative suit have not been unfairly affected, if at all. The court's

order rejecting plaintiff's motion to enjoin Lehman Brothers from acting as broker to the Fund was a proper exercise of the court's discretion in view of the fact that plaintiff made no showing that irreparable injury would result if the injunction were denied. If Lehman Brothers should act improperly as broker for the Fund, monetary damages would be an entirely adequate form of relief. In any case, a plenary trial on the merits, as Judge Tyler indicated in his colloquy with Leighton, is a much better alternative to the drastic relief requested. Leighton erroneously relies on *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963), for the proposition that the Investment Advisers Act requires the granting of an injunction in advance of a plenary suit in a case of this sort; *Capital Gains* presented a completely distinguishable situation. In that case, the Securities and Exchange Commission succeeded in obtaining an injunction compelling the investment adviser to make certain disclosures of "scalping" practices which otherwise operated as a fraud upon the adviser's clients. It had nothing to do with a brokerage firm and it did not go so far as to order a severing of the advisory relationship.

The court below was likewise correct in refusing to appoint a receiver for the Fund. Leighton's request, as in the preceding instance, was premised on claimed conflicts of interest concerning Lehman Brothers' relationship with the Fund and, additionally, on alleged waste of the Fund's assets by the defendant directors. Considering the extraordinary nature of the relief sought and the fact that any waste would be compensable in damages, and in view of the court's finding that there was no danger of irreparable injury, the ruling was proper.

Turning finally to Judge Cooper's order, denying Leighton's motion to enjoin the Fund from delivering any re-

leases in settlement of certain litigation arising out of a public offering in 1960 of Transitron common stock, we fail to discern how that denial may have prejudiced plaintiff's derivative action. In count four of his complaint, in typical shotgun fashion, plaintiff alleges various acts of waste on the part of the defendant directors in managing the Fund's assets, placing particular emphasis on the Fund's relationship with Lehman Brothers, and describes at length the Transitron transaction, also involving Lehman Brothers, which culminated in a substantial loss to the Fund. Plaintiff now seeks this injunctive relief asserting that the giving of the release to Transitron will result in a further waste and dissipation of the Fund's assets. The delivery of a release in settlement of a lawsuit is not an act of waste where fair consideration is received in return, which is apparently the case here, and, in any event, neither the derivative cause of action against Lehman Brothers nor against the directors for waste will be impaired in any way by this settlement. Furthermore, the settlement of the Transitron suit, which involves other purchasers of the stock besides the Fund, is currently under the supervision of another District Court.[2]

The orders appealed from are affirmed.

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[2] See *Cherner* v. *Transitron Electronic Corp.*, Civil Action No. 61-857-W (D. C. Mass.).

Memorandum and Order of April 30, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

TYLER, *D. J.*

This memorandum is filed in disposition of Motions No. 1 and 2 argued before the court on April 9, 1968.

In Motion No. 1, all defendants presently joined in this action move to dismiss and/or strike plaintiff's so-called "Amended Partial Complaint" pursuant to Rule 12(b)(4), F. R. Civ. P. upon the ground that service of such an amended pleading is not permitted by Rule 15(a), F. R. Civ. P.

Motion No. 2 actually is a series of motions by plaintiff to serve and file a supplemental complaint, to add new parties defendant and to obtain a preliminary injunction and the appointment of "a receiver for defendant The One William Street Fund, Inc." ("Fund").

For reasons to be briefly discussed hereinafter, defendants' motion to strike the proposed amended partial complaint is granted, and all of plaintiff's applications for relief hereinabove summarized are denied.

Defendants' Motion to Srike and/or Dismiss Plaintiff's Amended Partial Complaint.

Plaintiff, the owner of ten shares of the stock of the Fund (having a present value of about $155) commenced

this action in August, 1964. After a number of preliminary motions for injunctive relief, the appointment of a receiver for the Fund and other relief, all of which were denied, the defendants interposed general denials to the complaint. Defendants then promptly moved for summary judgment. By a memorandum opinion of this court filed by the undersigned on July 2, 1965, defendants' motion was granted in part and denied in part. Among other things, the memorandum of July 2, 1965 considered the so-called fifth cause of action as it was then pleaded by plaintiff. Specifically in this regard, plaintiff was given leave, after dismissal at that time of his original fifth cause of action, " . . . to replead (that stated claim) in concise fashion (showing) essential facts tending to support a claim pursuant to Section 9(a)(2) of the Investment Company Act of 1940 . . . " Now, for the first time, almost three years after that decision by this court, plaintiff attempts to serve a so-called amended partial complaint containing a new fifth cause of action. Whatever else may be said about this belated amended pleading, it plainly does not comply with either the letter or spirit of the direction of this court as set forth in the July 2, 1965 memorandum opinion. For that reason alone, defendants' motion to strike this proposed amended pleading is granted. Moreover, plaintiff has not obtained any other order of this court permitting him leave to serve the amended pleading he now wishes to serve. Rule 15(a), F. R. Civ. P.

Furthermore, it is specifically directed and ordered that plaintiff shall have no further opportunity to amend the so-called fifth cause of action. Both the chronology and discovery history of this litigation indicate that he has been dilatory in taking advantage of the permission given on

July 2, 1965 to replead his fifth claim.[1] It would be a miscarriage of justice at this time when this action is almost four years old to permit plaintiff to reconstitute his pleadings in a totally unexpected fashion, particularly inasmuch as it is perfectly clear that he has sought and obtained considerable discovery since July 2, 1965. To have a wholly new claim, which is already been indicated to be in non-compliance with the specific direction of this court of July 2, 1965, would be plainly prejudicial to the defendants.

Plaintiff's Omnibus Motion

In Motion No. 2, plaintiff has first sought leave to serve and file a supplemental complaint containing six new causes of action, "SIXTH" through "ELEVENTH". The proposed supplemental pleading to this effect is typically prolix and extremely difficult to understand. As best I can determine, each of the proposed new causes of action can be briefly and fairly described as follows:

1. The proposed sixth cause of action seems to complain that the Fund should have disposed of its holdings of Chesebrough-Pond's, Inc. stock when one of that company's officers was elected to the Fund's board of directors in 1964.

2. The proposed seventh cause of action apparently centers upon the contention that the Fund dealt in shares of Trans-World Airlines stock during the period following

[1] It appears that when the parties settled an order in response to this court's opinion of July 2, 1965, no specific time limit was placed upon plaintiff for filing an amended fifth cause of action. That fact does not excuse what plaintiff has failed to do and now attempts to do here.

a secondary offering of that stock which was at least partially underwritten by Lehman Brothers. Plaintiff seems to argue that this constituted a form of "systematic churning" and fraud on the part of defendant Lehman Brothers and its principals.

3. The proposed eighth cause of action appears to claim that the Fund has the right to 50,000 shares of Texas Gulf Sulphur stock purchased and owned by Lehman Corporation, a publicly held, closed-end investment company. Although plaintiff's allegations are far from clear, his apparent theory is that Lehman Brothers, as investment adviser to both the Fund and Lehman Corporation, advised the latter but not the former to purchase Texas Gulf Sulphur stock in 1963.[2]

4. The proposed ninth cause of action seems to allege that Lehman Brothers gave better investment advice to Lehman Corporation than to the Fund and somehow profited thereby, most particularly with regard to Xerox Corporation stock.

5. Plaintiff's proposed tenth cause of action charges the Fund with (1) directing executing brokers for Fund transactions to "give up" to certain non-executing brokers portions of the minimum commissions prescribed by stock exchange rules and (2) filing false tax returns for the years 1962 through 1965.

6. Finally, the eleventh cause of action is designed as a "roll-up" of most of the allegations contained in the pre-

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[2] But see plaintiff's ad damnum paragraphs for their eighth cause of action wherein, among other things, it is prayed that the Fund convey to Lehman Corporation another block of 50,000 shares of Texas Gulf Sulphur.

vious five claims. The only "new matter" pleaded is the vague allegation that, "In 1961 and 1962, defendant Lehman caused (the Fund) to make certain disastrous investments".

In effect, plaintiff, from the vantage point of hindsight, complains in all the new proposed claims of certain purchases and sales of securities by or for the benefit of the Fund, with the implication that these transactions were not as profitable as they might have been. Assuming that some of the Fund's transactions did not pan out as hoped, I cannot construe plaintiff's new allegations as coherent statements of claims cognizable by a federal court. Moreover, plaintiff's new causes of action do not appear to relate directly, as he suggests, to those of his original complaint which are still in issue. Thus, it would be an egregious burden upon the defendants to have superimposed upon this relatively old litigation some entirely new theories of recovery. This is particularly so in that, as I read them, all of the allegations in these proposed new causes of action are notably imprecise to the point of being unintelligible. In the exercise of discretion, therefore, plaintiff's application for leave to file a supplemental complaint is denied in all respects.

A similar ruling, in my view, is required with respect to plaintiff's application for leave to join as new parties defendant Lehman Corporation, Alvin W. Pearson, and James K. Hart in this action. The foregoing discussion and disposition of plaintiff's motion for leave to serve a supplemental complaint virtually requires a denial here in that the three putative defendants are ostensibly involved in the proposed new causes of action. Specifically, moreover, it does not appear that plaintiff seeks any relief against Pearson and Hart in his proposed supplemental complaint.

Consequently, his application for joinder of additional defendants is denied.

Plaintiff last applies pursuant to Rule 65, F. R. Civ. P. for an order preliminarily enjoining Lehman Brothers from acting as broker or investment adviser to the Fund and appointing a receiver for the Fund. According to my count, this is the third time that plaintiff has applied for this or substantially the same drastic relief. Despite the fact that the earlier applications were denied in August, 1964 and March of this year, plaintiff has submitted an affidavit in support of this motion which is a rehash of the allegations of the proposed supplemental complaint. This is woefully insufficient and does not even entitle plaintiff to an evidentiary hearing on this motion. In the absence of any colorable showing by plaintiff and upon consideration of the previous history of this litigation, this final motion of plaintiff is denied in all respects.

It is so ordered.

April 29, 1968.

Memorandum Filed May 15, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

HERLANDS, *District Judge*:

The motions before this Court are disposed of as follows:

(1) The Court grants in all respects defendants' motion for a protective order pursuant to Rule 30(b), Fed. R. Civ. P., allowing any defendant to raise henceforth all objections to any interrogatories served by plaintiff by stating concisely the fact of and ground for such objections in his verified answers to those interrogatories, and providing that such objections shall stand until and unless plaintiff moves for and obtains, pursuant to Rule 37(a), Fed. R. Civ. P., an order compelling answers to such interrogatories, after demonstrating to the Court that such objections are not well taken.

In view of the already extensive discovery by way of interrogatories, the lack of relevancy of some of the most recent interrogatories propounded by plaintiff, and the unduly burdensome nature of said interrogatories, this order is deemed necessary to protect defendants from annoyance, expense and oppression. Rules 30(b), 33, Fed. R. Civ. P.

(2) Defendant One William Street Fund's objections, pursuant to Rule 33, Fed. R. Civ. P., to plaintiff's interrogatories dated January 30, 1968, are hereby sustained.

Defendant Lehman Brothers' objections to plaintiff's interrogatories dated February 3, 1968, are likewise hereby sustained.

(3) In view of the foregoing, and in view of the further circumstances (a) that the interrogatories not answered by defendants are irrelevant to the issues remaining in this case, (b) that such answers would be unduly burdensome to defendants, and (c) that the failure of defendants to answer clearly did not violate Judge Palmieri's order dated August 19, 1966, plaintiff's motions* are hereby denied in all respects.

Plaintiff's application (filed in court on March 14, 1968) for special permission to make certain amendments to his motion papers is hereby denied; moreover, the application is insufficient to constitute an order to show cause.

Settle order on notice in accordance with the views expressed herein.

Dated: New York, N. Y.
May 15, 1968.

---

* Plaintiff seeks, *inter alia*, the following relief: (1) a default judgment, pursuant to Rule 37(b)(2)(iii), Fed. R. Civ. P., against the One William Street Fund and certain other defendants; (2) an order, pursuant to Rule 37(b), Fed. R. Civ. P., holding certain defendants and other individuals in contempt of Judge Palmieri's order of August 19, 1966; (3) an order, "in the exercise of the inherent powers of this Court," declaring that certain defendants "are in this Court with unclean hands"; and (4) an order, pursuant to Rule 37(b), Fed. R. Civ. P., allowing plaintiff reasonable expences, costs and fees in connection with the prosecution of these motions.

APPENDIX II

Findings and Order of Censure

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

February 5, 1969

Administrative Proceeding

File No. 3-1669

In the Matters of

LEHMAN BROTHERS
1 William Street
New York, New York

(8-246)

ROBERT LEHMAN

Securities Exchange Act of 1934—
Sections 15(b), 15A and 19(a)(3)

Private proceedings were instituted on August 8, 1968 pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act") which among other things raised the issues whether Lehman Brothers ("registrant"), a registered broker-dealer, willfully violated the record-keeping and reporting provisions of Section 17(a) of that Act and Rules 17a-3 and 17a-5 thereunder; whether registrant and Robert Lehman, its

managing partner, were responsible for a failure of supervision with respect to such alleged violations; what, if any, remedial action was appropriate; and whether, pending final determination of the foregoing issues, the public interest required that registrant's broker-dealer registration be suspended.

Thereafter, an offer of settlement was submitted limited solely to the suspension issue, under the terms of which it was agreed, among other things, that, pending determination of the other issues raised in the order for proceedings, registrant would not open additional branch offices, apply for additional registered representatives with the New York Stock Exchange, engage in over-the-counter trading in stocks for its only account, or accept (a) odd lot orders (except if necessary to eliminate or round out customers' existing odd lot positions), (b) orders for the purchase of securities selling at less than $5 per share, or (c) orders for short sales unless prior arrangements had been made to borrow the stocks concerned. It was further agreed that registrant would require assurances from customers selling securities that such securities would be in its possession on the settlement date; instruct all personnel to stop the solicitation of new brokerage accounts and not to accept orders for the sale of over-the-counter stocks unless (a) the certificates were in its possession, (b) the shares were purchased through it, or (c) the order was placed by an institutional customer; use its best efforts to hold its average daily transactions (whether as dealer or broker) during each calendar week to 900 or less; and retain a firm of certified public accountants to resolve existing differences in its accounts in accordance with a specific program. On October 31, 1968, we accepted that offer, and issued an

order restricting registrant's operations in accordance with its terms.

An offer of settlement as to the remaining issues has now been submitted under which, solely for the purpose of these proceedings and any other proceedings pursuant to the above cited provisions of the Exchange Act and Section 203(d) of the Investment Advisers Act of 1940, and without admitting or denying the allegations of willfulness, registrant consents to findings of willful violations of the bookkeeping provisions as alleged in the order for proceedings and to an order censuring it and its general partners.

Under the offer of settlement, registrant and its managing partner undertake and represent that:

1. All of registrant's books and records are fully posted and are and will be maintained in compliance with Section 17 of the Exchange Act and the rules and regulations thereunder, except that registrant's books and records as of November 30, 1968 reflect certain relatively small differences that are as yet unresolved.

2. Within 15 days after the end of each month through December 1969, registrant will send to our New York Regional Office a balance sheet and a report of net capital position including a list of all appropriate charges made in connection therewith; copies of all monthly reports submitted to the New York Stock Exchange, including but not limited to the Form MF-6 and the New York Stock Exchange Special Operations Questionnaire; and an affidavit stating whether registrant is in compliance with bookkeeping requirements.

3. Registrant will notify our New York Regional Office when at any time it is not materially in compliance with any of the terms, conditions or undertakings of this offer of settlement. In such event, registrant will become subject to such of the restrictions contained in our order of October 31, 1968 in this proceeding as, in the judgment of the Regional Administrator of our New York Regional Office after consultation with registrant, may be necessary in the circumstances, and shall remain subject to such restrictions until terminated by order of this Commission.

4. Registrant further agrees that if it appears that there has been a breach of any of the undertakings set forth above, a hearing may be convened upon 5 days' notice, to be held pursuant to our Rules of Practice, in order to determine whether such a breach has occurred and, if so, what if any additional sanctions should be imposed on registrant. For purposes of any such proceeding, registrant admits the findings of violations herein except for the findings of willfulness, and consents to the retention of jurisdiction in this matter for a period of 13 months and such additional time as may be necessary to adjudicate any issues raised at such hearing.

Registrant states that its record-keeping problems resulted from the inability of the firm's previous manual accounting system to accommodate an increased volume of transactions, that it has converted to an automated system, that the accounting firm retained by it furnished nearly 100 personnel to resolve the differences in the firm's records, and that there has been a very substantial improvement from earlier figures.

After due consideration of the offer of settlement, the undertakings contained therein, the efforts expended by

registrant to bring its operations into compliance with applicable requirements, and upon the recommendation of our staff, we have determined to accept the offer.[1]

On the basis of the order for proceedings and the offer of settlement, it is found that during the period from about March 22, 1968 to August 8, 1968, registrant willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that it failed to make and keep current certain books and records.

In view of the foregoing, it is in the public interest to take the remedial action specified in the offer of settlement.

Accordingly, IT IS ORDERED that, subject to the undertakings and agreements set forth above, Lehman Brothers and its general partners be, and they hereby are, censured; and that the separate allegations as to Robert Lehman be, and they hereby are, dismissed.

By the Commission (Chairman COHEN and Commissioners OWENS, BUDGE, WHEAT and SMITH).

Orval L. DuBois
Secretary

[1] Since the censure to be imposed pursuant to the offer is applicable to all of registrant's general partners, the separate charge as to a failure of supervision by the managing partner will be dismissed.

Respondents' Response to Request for Admissions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed February 27, 1969

Civil Action 64-Civ-2547

[TITLE OMITTED]

Defendants Lehman Brothers, Paul M. Mazur, Paul E. Manheim and Allan B. Hunter make the following statement in response to the request for admissions served upon them by plaintiff on February 21, 1969:

Without conceding relevance or materiality to this action thereof, said defendants admit that on or about February 5, 1969 the Securities and Exchange Commission issued the "Findings and Order of Censure" in Administrative Proceeding File No. 3-1669, a true and correct copy of which is annexed to plaintiff's request for admissions, and allege that said "Findings and Order of Censure" speak for themselves.

(Sworn to by Benjamin C. Milner, III, February 27, 1969.)

APPENDIX III

Statutes, Rules and Regulations Involved

Internal Revenue Code, 26 U. S. C.

Section 852(c). Earnings and Profits.

The earnings and profits of a regulated investment company for any taxable year (but not its accumulated earnings and profits) shall not be reduced by any amount that is not allowable as a deduction in computing its taxable income for such year.

Judicial Code, 28 U. S. C.

Section 1254. Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) by writ of certiorari granted, on the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • •

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States • • •

Section 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, • • • granting, continuing, modifying, refusing or dissolving injunctions • • •

Section 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

Investment Company Act of 1940, 15 U. S. C. Sec. 80a

Section 2. General Definitions.

(a) When used in this title, unless the context otherwise requires: * * *

(3) "Affiliated person" of another person means * * *

(C) any person directly or indirectly controlling, controlled by, or under common control with, such other person;

(D) any officer, director, partner, copartner, or employee of such other person;

(E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; * * *

Section 17. Transactions of Certain Affiliated Persons and Underwriters.

(a) It shall be unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company * * * , or any affiliated person of such a person, promoter, or principal underwriter, acting as principal—

(1) knowingly to sell any security or other property to such registered company or to any company controlled by such * * *

(b) Notwithstanding subsection (a), any person may file with the Commission an application for an order exempting a proposed transaction of the application from one or more provisions of that subsection. * * *

Section 35. Injunctions against Gross Abuse.

The Commission is authorized to bring an action in the proper district court of the United States * * * alleging that a person serving or acting in one or more of the following capacities has been guilty, after the enactment of this title and within five years of the commencement of the action, of gross misconduct or gross abuse of trust in respect of any registered investment company for which such person so serves or acts:

(1) as officer, director, member of an advisory board, investment adviser, or depositor;

* * * * *

Section 36. Larceny and Embezzlement.

Whoever steals, unlawfully abstracts, unlawfully and willfully converts to his own use or to the use of another, or embezzles any of the moneys, funds, securities, credits, property, or assets of any registered investment company shall be deemed guilty of a crime, and upon conviction thereof shall be subject to the penalties provided in section 49. * * *

Section 43. Jurisdiction of Offenses and Suits.

The district courts of the United States * * * shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity

and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. • • •

Investment Advisers Act of 1940, 15 U. S. C. Sec. 80b

Section 203. Registration of Investment Advisers.

• • •

(d) The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to, or suspend for a period not exceeding twelve months or revoke the registration of, an investment adviser, if it finds that such denial, suspension, or revocation is in the public interest and that

(1) such investment adviser, whether prior or subsequent to becoming such, or

(2) any partner, officer, or director thereof, or any person performing similar functions, or

(3) any person directly or indirectly controlling or controlled by such investment adviser, whether prior or subsequent to becoming such • • •

(D) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of this title, as any of such statutes may be amended, or of any rule or regulation under any of such statutes; or • • •

Securities Exchange Act of 1934, 15 U. S. C. Sec. 78

Section 10—Regulation of the Use of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 14. Proxies.

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Section 17. Accounts and Records, Reports, Examinations of Exchanges, Members, and Others.

(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, * * * and every broker or dealer registered pursuant to Section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * *

Federal Rules of Civil Procedure

Rule 33. Interrogatories to Parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party.

Rule 52. Findings by the Court.

(a) Effect. In all actions * * * in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for purposes of review. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

Rule 56. Summary Judgment. • • •

(d) Case not fully adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy • • • . Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 65. Injunctions.

(a) Preliminary Injunction. • • •

(2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. • • •

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in

reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

S. E. C. Rules under the Securities Exchange Act of 1934, 17 C. F. R. 240

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Rule 17a-3. Records to be made by certain exchange members, brokers and dealers.

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business: * * *

Federal Rules of Appellate Procedure

Rule 27. Motions.

(a) * * * Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rule 8, 9, 18 and 41 may be acted upon after reasonable notice * * *

Rule 39. Costs.

(c) Costs of briefs, appendices, and copies of records. * * * A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
FILED
APR 3 1969
JOHN F. DAVIS, CLERK

No. 1112

WILLIAM LEIGHTON, a stockholder of The One William Street Fund, Inc. for himself and all stockholders of The One William Street Fund, Inc. similarly situated and for and on behalf of The One William Street Fund, Inc.,

Petitioner-Plaintiff,

v.

THE ONE WILLIAM STREET FUND, INC., LEHMAN BROTHERS, a partnership, SIMPSON THACHER & BARTLETT, a partnership, and ALLAN B. HUNTER, PAUL E. MANHEIM, PAUL MAZUR, FRANCIS C. REED *et al.*,

Respondents-Defendants.

BRIEF OF RESPONDENTS-DEFENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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No. 1112

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Respondents-Defendants.

BRIEF OF RESPONDENTS-DEFENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

This is a derivative action against a mutual fund (The One William Street Fund) of which petitioner holds only ten shares, the Fund's investment adviser and broker (Lehman Brothers), some of the Fund's attorneys (Simpson

Thacher & Bartlett) and several officers and directors or former directors of the Fund (Hunter, Manheim, Mazur and Reed). The complaint, filed in August of 1964 in the United States District Court for the Southern District of New York, appears to allege various acts, failures to act and circumstances, some real and some fancied, which petitioner evidently believes violated statutory or common-law duties of the various defendants (R.1-27). Petitioner, though not a lawyer, has appeared *pro se* throughout.

This action has had a quite complicated history, most of which is unimportant for present purposes.

At this point, petitioner seeks to review a decision of the United States Court of Appeals for the Second Circuit (Petition, pp. 31-32) which:

1. affirmed the District Court's refusal to grant petitioner-plaintiff's third application for preliminary relief which would divorce a quarter of a billion dollar mutual fund from its management and throw it into receivership;
2. dismissed as unappealable the District Court's striking of an "Amended Partial Complaint (Fifth Cause of Action)"; and
3. dismissed as unappealable the District Court's denial of leave to serve and file a supplemental complaint containing six new causes of action.*

Preliminary Injunction and Receivership. The arguments on which petitioner seeks to throw the Fund into

* The Court did not address itself to petitioner's attempt to overturn another District Court order (from which no appeal had been taken) insofar as that order had failed to declare that certain defendants were in court with "unclean hands."

receivership are difficult to follow and impossible to summarize. No substantial reason is given to support such drastic relief, the consequences of which have been described by respondents-defendants as follows:

> "* * * It would suddenly deprive a publicly held mutual fund with approximately one-quarter of a billion dollars in net assets of its investment adviser, its principal broker, and its entire staff, all of whom are paid by Lehman Brothers under the investment advisory contract. (Admittedly, the broker could probably be readily replaced.) The predictable result would be a rush by stockholders to redeem their shares, the liquidation of the Fund's assets, and the probable demise of the Fund. While this might be a source of intense personal satisfaction to the plaintiff, who owns ten shares of the Fund, having a present net asset value of approximately $162.50, it would probably be a source of considerable distress to the holders of the more than fifteen million other shares of the Fund. I respectfully submit that in this particular respect, at least, the interests of the holders of more than one-quarter of a billion dollars of shares in a continuing investment in the Fund outweigh whatever interest Mr. Leighton may have by virtue of his comparatively miniscule investment." (R.1878-79)

The District Court denied petitioner's motion:

> "* * * According to my count, this is the third time that plaintiff has applied for this or substantially the same drastic relief. * * * [P]laintiff has submitted an affidavit in support of this motion which is a rehash of the allegations of the [typically prolix and extremely difficult to understand] proposed supplemental complaint. This is woefully insufficient and does not even entitle plaintiff to an evidentiary hearing on this motion. In the absence of any colorable showing by

> plaintiff and upon consideration of the previous history of this litigation, this * * * motion of plaintiff is denied in all respects." (R.1903-04, Petition, p. 44.)

Amended Partial Complaint. In July of 1965, petitioner's original fifth cause of action was dismissed "with leave to . . . replead in concise fashion essential facts tending to support a claim purusant to . . . Section 9(a)(2) [of the Investment Company Act of 1940]." (R.603.) In February, 1968, some two and one-half years later, petitioner served an "Amended Partial Complaint" limited to the fifth cause of action.

Whatever else may be said about that amended fifth cause of action (R. 1453-75), it clearly did not "replead in concise fashion essential facts" establishing anything, and failed in any way whatever to plead a violation of Section 9(a)(2) of the Investment Company Act. On defendants' motion, it was stricken by the Court (R.1896-99, Petition, pp. 39-44).

Supplemental Complaint... On April 9, 1968, after nearly three years of discovery and numerous motions in this case, petitioner moved for leave to serve a supplemental complaint containing six new, different and all but incomprehensible causes of action (R.1765-86). Defendants opposed the motion. The District Court ruled:

> "In effect, plaintiff, from the vantage point of hindsight, complains in all the new proposed claims of certain purchases and sales of securities by or for the benefit of the Fund, with the implication that those transactions were not as profitable as they might have been. Assuming that some of the Fund's transactions did not pan out as hoped, I cannot construe plaintiff's

new allegations as coherent statements of claims cognizable by a federal court. Moreover, plaintiff's new causes of action do not appear to relate directly, as he suggests, to those of his original complaint which are still in issue. Thus, it would be an egregious burden upon the defendants to have superimposed upon this relatively old litigation some entirely new theories of recovery. This is particularly so in that, as I read them, all of the allegations in these proposed new causes of action are notably imprecise to the point of being unintelligible. In the exercise of discretion, therefore, plaintiff's application for leave to file a supplemental complaint is denied in all respects." (R. 1901-02, Petition, p. 43.)

Unclean Hands. Petitioner on March 14, 1968 moved the District Court

> "* * * in the exercise of the inherent powers of this Court, to find and determine that defendants Lehman Brothers, Allan B. Hunter, Paul [illegible] Manheim, Paul M. Mazur and Francis C. Reed were and are in this Court with unclean hands and to direct that all further equitable relief be denied to such defendants in this action." (R.1561.)*

This curious prayer for relief was denied (R. 1938-40, Petition, pp. 45-6), and no appeal was taken from the denial.

The factual basis for the relief sought was said to be the Fund's purported failure to answer one interrogatory (R. 1562-68). The whole history of the matter is set forth at R. 1654-58. Briefly, however, what happened was this: petitioner served interrogatories requesting voluminous amounts of information from the Fund. The Fund ob-

* No equitable relief has been sought or obtained by any defendant in this action.

jected. The District Court sustained virtually all objections, but did direct the Fund to furnish to petitioner certain readily available tax returns. The Fund did just that. The fact that those tax returns did not answer his interrogatories was the basis for petitioner's motion.

ARGUMENT

POINT I

The Petition itself is good reason for denying certiorari.

Rule 23 [4] of this Court specifies that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

The Petition is plainly within the scope of this Rule.

POINT II

There are no considerations justifying certiorari.

Rule 19 [1](b) of this Court sets forth the character of reasons for granting certiorari. No such reason is present here.

No conflict between circuits exists.

No important state or territorial question has been decided.

No important question of federal law exists.

No federal question has been decided in conflict with any decision of this Court. Petitioner cites *S.E.C.* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) as such a decision. It is not. There, this Court was

> "* * * called upon * * * to decide whether under the Investment Adviser's Act of 1940 the Securities and Exchange Commission may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for a long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation." (375 U.S. at 181).

Heretofore, the instant case has involved neither that statute nor that question.

There is no such departure from the usual course of judicial proceedings in this case as to justify intervention by this Court. Petitioner's claim that over the years

> "* * * the courts below have adopted towards petitioner an attitude of hostility, bias and prejudice which is reflected in their abuse of discretion and usurpation of judicial powers * * *" (Petition, p. 13)

is completely unsupported by the record.

Indeed, an examination of the record in this proceeding will show that both Court and opposing counsel have gone to great lengths to indulge petitioner in his bizarre conduct of this case, and that the District Court (particularly Judges Sugarman, Feinberg, Cooper, Murphy, Croake, Tyler, Herlands and Palmieri thereof) has bent over backwards to be scrupulously fair to petitioner.

POINT III

The decision below is clearly correct.

Petitioner-plaintiff's third application for equitable relief throwing the Fund into receivership was denied by the District Court because the showing in support thereof was "woefully insufficient" (R. 1904, Petition, p. 44). That was affirmed by the court below. It is axiomatic that drastic equitable relief should not be afforded on the basis of "woefully insufficient" showings. That the phrase was apt in the circumstances can hardly be questioned. See pp. 2-4, *supra*.

The District Court's refusal to permit petitioner to amend or supplement his complaint to assert a plethora of wholly new and unrelated matters was held unappealable by the Court below. Since Section 1291 of the Judicial Code permits only appeals of "final decisions" of district courts, and since several issues remain unresolved in this proceeding, that holding is clearly correct. (So was the District Court's exercise of discretion in the first instance; see pp. 4-5, *supra*.)

The District Court's refusal to declare that certain defendants were in court with unclean hands was never appealed and wasn't final. Moreover, the whole premise of petitioner's motion in this respect was absurd (see pp. 5-6, *supra*). The failure by the Court below to consider it was not in error.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari herein should be denied in all respects.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAY 14 1969

JOHN F. DAVIS, CLERK

No. 1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM LEIGHTON, a stockholder of The One William Street Fund, Inc. for himself and all stockholders of The One William Street Fund, Inc. similarly situated and for and on behalf of The One William Street Fund, Inc.,

Petitioner-Plaintiff,

—v.—

THE ONE WILLIAM STREET FUND, INC., LEHMAN BROTHERS, a partnership, SIMPSON THACHER & BARTLETT, a partnership, and ALLAN B. HUNTER, PAUL E. MANHEIM, PAUL M. MAZUR and FRANCIS C. REED *et al.*,

Respondents-Defendants.

PETITION FOR REHEARING

WILLIAM LEIGHTON
Petitioner-Plaintiff Pro Se
249 West 11th Street
New York, N. Y. 10014

May, 1969

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Respondents-Defendants.

PETITION FOR REHEARING

Pursuant to Rule 58(2) of the Rules of this Court, petitioner respectfully prays that so much of the Order of April 21, 1969 herein as had denied the petition for certiorari be vacated and that the petition for certiorari be granted for these reasons:

1. Mr. Justice Fortas should not have participated in the consideration of the petition for certiorari.

During the effective period of a stay which the District Court had decreed in this action on November 5, 1964 (Tr.

518-521), the respondent-defendants Lehman Brothers secured from the stockholders of the Fund permission to invest the Fund's assets in the securities of companies in which Lehman Brothers hold directorships, R. 155a-156a. The obvious reason for this was to facilitate the underwriting by Lehman Brothers of new securities issued by such companies. One such company was Federated Department Stores, Inc. ("Federated").

The June 1, 1964 proxy statement of Federated, a company listed on the New York Stock Exchange, states, in pertinent part:

> Mr. Abe Fortas, a director of the Company, is a member of the firm of Arnold, Fortas & Porter, Washington, D. C. and Mr. Dillon Anderson, a director of the Company, is a member of the firm of Baker, Botts, Shepherd & Coates, Houston, Texas, which law firms perform legal services for the Company. Mr. Paul M. Mazur, a director of the Company, is a member of the firm of Lehman Brothers, with which firm the Company from time to time has brokerage transactions in the normal course of business and which firm is retained for economic and investment advisory services.

The April 23, 1965, proxy statement of Federated states, in pertinent part:

> Mr. Abe Fortas, a director of the Company, is a member of the law firm of Arnold, Fortas & Porter, Washington, D. C., which firm, during the fiscal year ended January 30, 1965, was paid the sum of $110,836 for legal services. Mr. Dillon Anderson, a director of the Company, is a member of the law firm of Baker, Botts, Shepherd & Coates, Houston, Texas. These law firms

perform legal services for the Company. Mr. Paul M. Mazur, a director of the Company, is a member of the firm of Lehman Brothers, with which the Company from time to time has brokerage transactions in the normal course of business and which firm is retained for economic and investment advisory services.

The April 26, 1966 proxy statement of Federated states, in pertinent part:

Justice Abe Fortas, who was a director and officer of the Company until October 1, 1965, was, until that date, a member of the law firm of Arnold, Fortas & Porter, Washington, D. C. which firm during the fiscal year to October 1, 1965 was paid the sum of $196,463 for legal services. Mr. Dillon Anderson, a director of the Company, is a member of the law firm of Baker, Botts, Shepherd & Coates, Houston, Texas, which firm during the fiscal year ended January 29, 1966 was paid the sum of $30,950 for legal services. These law firms perform legal services for the Company. Mr. Paul M. Mazur, a director of the Company, is a member of the firm of Lehman Brothers, with which the Company from time to time has brokerage transactions in the normal course of business and which firm is retained for economic and investment advisory services. Lehman Brothers was one of the representatives of the several underwriters in the public offering of $20,000,000 principal amount of 4½% Convertible Debentures, due December 15, 1985, sold by Federated Department Stores International Company, a wholly-owned subsidiary of the Company. Lehman Brothers underwrote $1,650,000 of these Debentures for which it received gross underwriting commissions of $41,250.

Respondents-defendants Lehman Brothers and Paul M. Mazur are in this Court as parties to this proceeding. During the period of time covered by the complaint and prior to October 1, 1965, such respondents-defendants were the business partners of Mr. Justice Fortas in his then capacity as attorney, director and officer of Federated.

Petitioner respectfully submits that elementary fairness required that Mr. Justice Fortas should not have participated in the consideration of a petition for certiorari which challenges the conduct of these respondents-defendants during the period prior to October 1, 1965.

2. The denial of certiorari in this case constitutes manifest injustice when compared with the grant of certiorari in No. 992.

On March 25, 1969, this Court has granted certiorari in No. 992, *Ross* v. *Bernhard et al.* For all practical purposes, the respondents in No. 992 are the same as the respondents here. Respondent Lehman Brothers is a respondent-defendant in both cases. The law firm of Simpson Thacher & Bartlett represents Lehman Brothers in both cases. And, as petitioner has contended in the proposed supplemental complaint, R. 131a *et seq.*, the Lehman Corporation is the *alter ego* of The One William Street Fund, Inc. by reason of the substantial number of identical securities positions carried by both corporations and by reason of their having a common investment adviser, Lehman Brothers. It is for this reason that petitioner moved in the District Court to add The Lehman Corporation as a party to the case at bar. The District Court denied this motion by its order of April 30, 1968, here under review.

The manifest injustice of granting certiorari in No. 992 but of denying it in the case at bar is striking. The peti-

tioner-plaintiff in *Ross* appears to be a phantom whose status as a minor shareholder of The Lehman Corporation is being used by his alleged attorneys, Pomerantz, Levy, Haudek and Block ("Pomerantz") in furtherance of a scheme to exact substantial fees from Lehman Brothers through the device of a settlement. The record here shows that such was the pattern of the 1962 settlement between Pomerantz and Lehman Brothers, see the Amended Partial Complaint, R. 82a *et seq.* This is the pleading which the District Court has struck by its order of April 30, 1968, here under review. In the 1962 settlement, Pomerantz exacted from Lehman Brothers $100,000 as his fee for discontinuing another spurious derivative suit against The One William Street Fund, Inc. which he had caused to be filed in the name of another phantom plaintiff.

Having been successful in 1962, Pomerantz is now pursuing a bolder scheme, that of dragging Lehman Brothers through a jury trial at the conclusion of which, or under the threat of which, Pomerantz would offer to settle for a fee substantially in excess of the fee which he might receive if a jury trial were denied. In order to succeed in this scheme, Pomerantz needs a review by this Court of the substantial constitutional questions decided in *Ross* v. *Bernhard,* 403 F. 2d 909, 910, 915 (2nd Cir., 1969).

Since this Court has granted certiorari in *Ross,* it would appear that, in aid of such jurisdiction, 28 U. S. C. Section 1651(a), certiorari should be granted here because it is only on the basis of this record that Pomerantz and Simpson Thacher & Bartlett can be disciplined and held accountable for the 1962 collusive settlement described in the Amended Partial Complaint. Were Pomerantz and Simpson Thacher & Bartlett so disciplined, there would be no

occasion for this Court to adjudicate the substantial constitutional questions presented by the petition for certiorari in *Ross*.

The petition for rehearing should be granted and a writ of certiorari should issue in aid of this Court's jurisdiction in *Ross*, 28 U. S. C. Section 1651(a).

Respectfully submitted,

WILLIAM LEIGHTON
Petitioner Pro Se

Certificate

Pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States petitioner hereby affirms that this petition for rehearing is based on intervening circumstances of substantial and controlling effect and on grounds not set forth in the petition for certiorari, and that it is presented in good faith and not for delay.

WILLIAM LEIGHTON
Petitioner Pro Se